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OFFICE OF PETITIONS

In re Application of	:	
Stephens et al.	:	
Application No. 09/727,060	:	DECISION ON
Filed: November 30, 2000	:	PETITION
Attorney Docket No. TI-28757	:	

This is a decision on the "PETITION TO REVIVE," filed June 18, 2003 in the above-identified application. Applicants petition to revive the subject application under the provisions of 37 CFR 1.137(a), or in the alternative, under the provisions of 37 CFR 1.137(b).

The petition under § 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." Extensions of time under 37 CFR 1.136(a) are permitted.

The petition under § 1.137(b) is **GRANTED**.

The above-identified application became abandoned for failure to file a timely reply to the non-final Office action mailed July 17, 2002. This restriction requirement set forth a shortened statutory period for reply of three (3) months, with extensions of time obtainable under § 1.136(a). No reply was filed within this period and no extensions of time under the provisions of 37 CFR § 1.136(a) were obtained. Accordingly, the above-identified application became abandoned on October 18, 2002. The present petition precedes the mailing of a Notice of Abandonment.

Petitioner states that the Office action was never received¹ according to the records of the assignee Patent Department and the abandonment was not discovered until the examiner called to question whether it was the intention to abandon the application. However, petitioner submitted no docket records in support of this contention and included no statements from practitioner or applicants attesting to the fact that a search of the file jacket and docket records indicated that the Office communication was not received.

¹ Petitioner states that they received a copy of the Office action by telefax from the examiner.

Consideration of Petition under § 1.137(a)

A grantable petition under § 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR §1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in §1.20(d)) required pursuant to §1.137(d). The instant petition lacks item (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (*quoting Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), *aff'd*, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32.

A review of the Office action of July 17, 2002 reveals that the action was mailed to the correspondence address of record. The record reveals no irregularity in mailing. Petitioner's evidence does not overcome the presumption that the communication was properly mailed to the applicant at the correspondence address of record. The showing required to establish non-receipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. In addition, a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. Petitioner has not submitted such evidence. Accordingly, it cannot be concluded that petitioner has met his burden of establishing that the delay was "unavoidable."

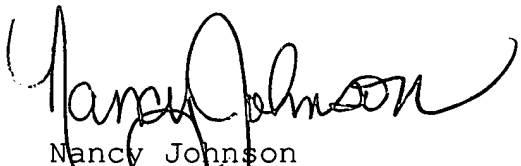
Having not made an adequate showing of non-receipt of the Office action or otherwise established unavoidable delay, the petition cannot be granted under § 1.137(a).

Consideration of Petition under § 1.137(b)

Nonetheless, petitioner has met the requirements for a grantable petition under § 1.137(b) on the basis of unintentional delay. The petition includes the reply required in the form of an election; payment of the petition fee; and a statement of unintentional delay. 37 CFR 1.137(b)(3) requires a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The statement contained in the instant petition varies from the language required by 37 CFR 1.137(b)(3). The statement contained in the instant petition is being construed as the statement required by 37 CFR 1.137(b)(3). Petitioner must notify the Office if this is **not** a correct interpretation of the statement contained in the instant petition.

The application file is being forwarded to Technology Center 2817 for consideration of the election by the Examiner.

Telephone inquiries related to this decision should be directed to the undersigned at (703) 305-0309.

A handwritten signature in black ink, appearing to read "Nancy Johnson", is written over the typed name and title.

Nancy Johnson
Senior Petitions Attorney
Office of Petitions